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IN THE

Supreme Court of the United States

October Term, 1965

No. 219

JOHNNIE K. BAXSTROM,
Petitioner,

v.

R. E. HEROLD, Director, Dannemora State Hospital,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION AND BRIEF IN SUPPORT OF RESPONDENT'S MOTION

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Motion for Leave to File Brief as to New Matters Brought Out by the Supreme Court During Oral Argument

Respondent respectfully asks consideration of this motion for leave to file a short brief as to new matters for the following reasons:

(1) Briefs and oral arguments on both sides did not crystallize exactly how the right to a jury trial as granted to the civilly insane by the statutes of New York is limited;

(2) The Court's references to the impact of "accident of time" would seem to call for response from respondent;

(3) The issues and the answers might well be more clearly outlined by granting consideration to this added material.

BRIEF IN SUPPORT OF RESPONDENT'S MOTION

Additional Statute Involved

Mental Hygiene Law § 101.

§ 101. Proceeding for declaration of incompetency and appointment of committee generally

(1) Petitioner; duty of superintendent of poor. Any person may commence a special proceeding to declare a person incompetent and to appoint a committee of an incompetent. Where the property of any person is endangered by reason of his incompetency and no proceeding has been commenced, the officer performing the function of superintendent of the poor of the place where such person resides shall bring the proceeding; his expenses shall be audited and allowed in the same manner as other official expenses.

(2) Venue. The proceeding shall be brought in the Supreme Court or before a justice of the Supreme Court within the judicial district, or in the county court or before the county judge of the county, where the alleged incompetent resides; or, if he is an inmate of a state mental institution, where the institution is situated or where he resided before he became an inmate. If the incompetent resides without the state, or if his residence cannot be ascertained, his residence shall be deemed the county where some of his property is situated.

(3) Contents of petition. The petition shall be verified and, insofar as can be ascertained with reasonable diligence, shall state facts showing incompetence; the names and residences of the spouse of the incompetent, the person with whom he resides, and his known distributees at the date of the petition; and the nature, probable value

and income of his property and what property has been conveyed during the period of alleged incompetency, to whom and for what consideration.

(4) Notice of petition. Unless the court orders otherwise, notice of petition shall be served upon the alleged incompetent and his spouse or if none is known to the petitioner, the distributees at the date of the petition, if known, or if none is known, the person with whom he resides. If the person alleged to be incompetent is an inmate of a state institution, notice shall also be given to the officer in charge of the institution. The court shall direct such further notice of the proceeding as it deems proper.

(5) Trial on issue of incompetency. Unless the court decides, in the exercise of its discretion, that the proceeding should be dismissed, it shall order a trial by jury of the issue of competency. The court may order a special jury empanelled. Alternatively, the court may order an inquiry into the issue of competency by the issuance of a commission, in which case the provisions of subdivision six of this section shall govern. Upon the return of such commission, or upon the rendering of the verdict of the jury, the court either must direct a new trial or issue a new commission or make such final order upon the petition as justice requires.

(6) Proceedings upon trial by jury before commissioners. The commission must direct the commissioners to procure a jury; and that they inquire, by the jury, into the matters set forth in the petition; and also into the value of the real and personal property of the person alleged to be incompetent, and the amount of his income. It may contain such other directions with respect to the subjects of inquiry or the manner of executing the commission as the court directs to be inserted therein, subject to rules.

The commissioners, or a majority of them, immediately must issue a precept to the sheriff of the county to direct the county clerk or the commissioner of jurors, as the case may be, to draw and summon not less than twelve nor more than twenty-four indifferent persons, qualified to serve and not exempt from serving as trial jurors in the same court, to appear before the commissioners at a specified time and place within the county, to make inquiry as commanded by the commission. The commissioner of jurors, or the county clerk must draw and summon the jurors accordingly, and must return the precept and the names of the persons notified to the commissioners at the time and place specified. The commissioners, or a majority of them, must determine a challenge made to a juror. Upon the failure to attend, of a person who has been duly notified, his attendance may be compelled; and he may be punished by the court for a contempt, as where a juror duly notified fails to attend at a trial term of the court. The commissioners may require the sheriff to direct the commissioner of jurors, or the county clerk, to draw and summon an additional juror, as provided by law to attend in place of a juror notified and not attending, or who is excused or discharged. But it is not necessary to cause any additional juror to attend if at least twelve of the persons summoned appear and are sworn.

All the commissioners must attend and preside at the hearing; and they, or a majority of them, with respect to the proceedings upon the hearing, have all the power and authority of a judge of the court holding a trial term, subject to the directions contained in the commission. Either of the commissioners may administer the usual oath to the jurors. At least twelve jurors must concur in a finding. If twelve do not concur, the jurors must report their dis-

agreement to the commissioners, who must thereupon discharge them and procure another jury.

The inquisition must be signed by the jurors concurring therein, and by the commissioners or a majority of them, and be annexed to the commission. The commission and inquisition must be returned by the commissioners and filed with the clerk.

The petitioner must pay the compensation of the commissioners and sheriff. The compensation of jurors shall be paid by the county in the manner provided by law for the payment of jurors upon a trial of an issue in an action in the same court.

(7) Injunction; temporary receiver. Where it satisfactorily appears from the petition and affidavits that any person has acquired any property from the alleged incompetent during the time of such alleged incompetency without adequate consideration, the court may, with or without security, restrain such person from selling, assigning or disposing of said property or confessing a judgment which may become a lien on said property during the pendency of the proceeding hereunder. Such order may, in the discretion of the court, be continued for ten days after the appointment of a committee. Notice of the appointment of a committee shall be given to any person enjoined in such manner as the court may prescribe. The court may appoint a temporary receiver to preserve the property of the alleged incompetent pending adjudication of incompetency.

(8) Notice of pendency. In all proceedings under this article, if real property or any interest therein is or may be affected, the petitioner shall, prior to final judgment, file a notice of pendency.

(9) Costs. Where a judgment is made dismissing a petition, the court may award a fixed sum as costs, not exceeding fifty dollars and disbursements, to be paid by the petitioner to the alleged incompetent. Where the petition is granted, the court shall direct the payment out of the funds of the incompetent, of the necessary disbursements of the petitioner and of such a sum for his costs and reasonable counsel fees. In its discretion, the court may direct the committee to pay a sum not exceeding fifty dollars and disbursements, to the attorney for any person opposing the adjudication.

ARGUMENT

During oral argument before the Court, questions by the Justices brought forth matters that would seem to require brief exposition in the interests of truth and justice.

I

Preliminarily, we respectfully call attention to the fact that New York does *not* grant a statutory right to a jury trial without restriction in a civil proceeding to have a person committed as insane. New York limits the right to a jury *"as in the case of proceedings for the appointment of committee for a mentally ill person."* Mental Hygiene Law § 74 (A-31). This is a restriction that was not brought out by either side at any time.

By this limiting phrase, § 74 incorporated Mental Hygiene Law § 101 (quoted *supra*). And the entire spirit of § 101, with its detailed attention to property rights, costs and fees, manifests a primary legislative concern for matters other than the single question of establishing sanity by means of a jury trial only. On the other hand, § 384 involves the

solitary question of sanity—minus side issues and other distracting factors.

We therefore maintain that the different issues necessarily involved under §§ 74 and 101 of the Mental Hygiene Law justify the different procedures prescribed therein. As against the single issue of mental condition under Correction Law § 384, surely there is substantial reason for different approaches and different procedures—as intended by the Legislature. These prescribed procedures, painstakingly created according to needs of each class of persons, do not constitute a denial of equal protection to the criminally insane.

II

The Justices, in interrogation, pointed out that "an accident of time" was responsible for the denial, under New York law, of a jury trial in the case of an insane person retained at expiry of his prison sentence. The Justices pointed out that this same person, were he out on the street (because of release from prison) and *then* submitted to a sanity hearing, could demand a jury trial. Our discussion *supra* shows that such a demand is hardly unrestricted, when weighed in light of all related statutes.

But further, we respectfully submit that one who is adjudged insane *while serving time in a prison cell* is affected with equal force by "accident of time" as is one whose term has expired and yet continues to be retained as insane. The insane criminal, too, would be out on the street and entitled to identical rights—alas but for the accident of time. By that logic, he too should have a jury to test his sanity—not under Correction Law § 384, but under Correction Law § 383.

Then where is the logical end? In *habeas corpus,* in any proceeding at any time, may any person at any time demand a jury trial at a sanity hearing? We believe not for the reasons presented here as well as for the reasons set forth in our brief at pages 8 and 16.

CONCLUSION

It is respectfully submitted that the order of the Court of Appeals of the State of New York should be affirmed.

Dated: December 28, 1965.

Respectfully submitted,

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